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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.
No. 295.

CHARLES D. NEWTON, as Attorney General of the State of New York, and ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District,

Appellants,

against

KINGS COUNTY LIGHTING COMPANY,

Appellee.

Direct Appeal from the United States District Court for the Southern District of New York.

BRIEF AND ARGUMENT FOR APPELLEE.

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IN THE

Supreme Court of the United States

October Term, 1921.

No. 295.

CHARLES D. NEWTON, as Attorney General of the State of New York, and ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District,

Appellants,

against

KINGS COUNTY LIGHTING COMPANY,

Appellee.

Direct appeal from the United States District Court for the Southern District of New York.

BRIEF AND ARGUMENT FOR APPELLEE.

Harry E. Lewis, as District Attorney of the County of Kings, was made a party defendant in this cause. He defaulted in appearance and pleading (p. 24) and is not an appellant (pp. 78-92). Nevertheless the Corporation Counsel of the City of New York has filed a brief on this appeal for said Harry E. Lewis, as District Attorney, urging that the decree herein be reversed. The appellee objects to the court's considering said brief or permitting counsel for said Lewis to be heard upon the argument of this appeal (*Supreme Court Rules* 21, 35; *The Gray Jacket*, 5 Wall. 370; *Northern Securities Co.* v. *U. S.*, 191 U. S. 555).

Alfred M. Barrett, constituting the Public Service Commission of the State of New York for the First District, duly appealed from the decree. The Public Service Commission of the State of New York for the First District was abolished by chapter 134 of the laws of 1921, which became a law March 30, 1921, and the jurisdiction theretofore exercised by said Public Service Commission for the First District was conferred by said chapter upon the Public Service Commission of the State of New York composed of five commissioners subsequently appointed by the Governor. The new Public Service Commission has not been substituted as appellant in place of said Barrett, and Charles D. Newton, as Attorney General of the State of New York, remains the sole appellant.

The brief filed by counsel for the appellant Newton does not contain a specification of the errors relied upon, stating as particularly as may be in what the decree is alleged to be erroneous, as required by Rule 21, and in consequence counsel for said appellant will not be heard except at the request of the court, and the court in any event can only notice a "plain error" if any such exists (*Supreme Court Rules* 21, 35; *Portland Co. v. U. S.*, 15 Wall 1; *Milwaukee v. S. & S. Co.*, 91 Fed. 858; *Columbia Heights Realty Co. v. Rudolph*, 217 U. S. 547; *Briscoe v. District of Columbia*, 221 U. S. 547; *Stevenson v. Barbour*, 140 U. S. 48).

Statement of Case.

The appellee is obliged to make a statement of the case since the brief filed by counsel for the appellant Newton does not contain a statement thereof, as required by Rule 21.

This is an appeal by a defendant below from the District Court for the Southern District of New York direct to this court under section 238 of the Act of March 3, 1911, (ch. 231, The Judicial Code) to correct and reverse a decree of that court filed October 28th,

1920. The decree declares unconstitutional and void, and restrains the enforcement of, chapter 125 of the laws of 1906 and chapter 604 of the laws of 1916 of the State of New York in so far as said statutes, or either of them, prescribe a rate or price to be charged by appellee, plaintiff below, for gas furnished by it, with the usual provision for a modification or vacation of the injunction on the application of the defendants, if it can be shown that by change in conditions the statutory rate is no longer confiscatory.

Chapter 125 of the laws of 1906 (the full text of which is printed in the appendix hereto) fixed the maximum price of illuminating gas in the thirtieth ward and after January 1st, 1910, in the thirty-first ward of the borough of Brooklyn, city of New York, at $1. per one thousand cubic feet. This act was so amended by chapter 604 of the laws of 1916 (the full text of which is also printed in the appendix hereto) as to fix the maximum price of gas in said wards from and after July 1st, 1916, at 80 cents per thousand cubic feet. Appellee supplies gas for public and private use in the thirtieth ward, and to a small extent in the thirty-first ward, of said borough of Brooklyn. Appellee brought this suit in May, 1920, against the officers charged with the enforcement of the statutes alleging that the maximum rate so prescribed was confiscatory and the statutes in contravention of the Fourteenth Amendment to the Constitution of the United States. The testimony was taken before a special master upon whose report and the testimony so taken the decree appealed from was made.

Property used in the public service

Appellee manufactures carburetted water gas and is the owner of a manufacturing works with five gas-making machines of a rated capacity of 9,600,000 cubic feet of gas per day, and whose actual working capacity under normal conditions is about 7,250,000 cubic feet

per day. Its gas holders, having a storage capacity of 2,500,000 cubic feet, are connected with its works by a twenty inch high pressure transmission main, one and one-half miles in length. Appellee has approximately 200 miles of gas mains laid in the streets of the territory, and on July 1st, 1920, had installed on the premises of consumers 38,956 meters, connected with its mains by approximately 20,200 service pipes. Its mains were also connected with approximately 3,500 street lamps maintained by the city of New York, to which appellee furnished gas for street lighting. The territory served by appellee is a suburban community still in the process of development for residential purposes, with a present population of approximately 250,000. Appellee alleged that the fair value of its said plant and property employed in the public service was at least $6,000,000. No proof of value was given at the trial, but the defendants conceded that the fair value of the plant and property for the purpose of the case was at least $3,300,000 (pp. 605-611).

Cost of producing and distributing gas

To show the confiscatory character of the statute, appellee proved the expense or cost of manufacturing and distributing gas in the calendar year 1919 and the first six months of 1920. The proof showed that it had cost the appellee 86.01 cents per one thousand cubic feet for the gas manufactured and sold in 1919 (plaintiff's exhibits 2 and 6, pp. 1029-1033), and 97.3 cents per thousand cubic feet for the gas manufactured and sold in the six months ended June 30th, 1920 (plaintiff's exhibits 12 and 13, pp. 1034-1037). The Master found that the quantities of material used and the prices paid by appellee were reasonable and necessary, and the court found that "it cost plaintiff and would have cost any other well operated maker of gas oil gas at least 84 cents to furnish one thousand cubic feet of gas in the year 1919, and at least 96 cents to do the same

thing in 1920" (p. 74), and the Master's report as confirmed by the court contains the additional finding:

> "38. The evidence adduced before me affords no reasonable grounds for expecting that the price of materials or the wages paid to labor in connection with the production and distribution of gas will be reduced during the last few months of 1920 or during the year 1921. On the contrary, the evidence shows that the complainant during at least the second half of the calendar year 1920 will be required to pay substantially higher prices for the materials used in the production and distribution of gas than during the calendar year 1919 or the six months ending June 30, 1920, and that its labor costs for the second half of the calendar year 1920 will be somewhat higher than they were during the calendar year 1919 and the six months ending June 30, 1920."

ARGUMENT.

In this case appellee availed itself of its constitutional right, now established by a long line of decisions, to test as a judicial question the repugnancy of the statutory rate to the constitution. The proof showed that the bare operating costs were in excess of the statutory rate at the date of the decree and had been for a period of more than eighteen months. It was unnecessary to establish the full value of the plant and property used in the public service, appellee accepting for the purposes of the case a valuation of at least $3,300,000, conceded by the defendants. In the circumstances the court would not even pass upon the question as to what was a reasonable rate of return. Few of the questions ordinarily arising in a case of this character are present in this case and appellee is not called upon to review the authorities in the entire field of rate regulation. Our purpose will be to present in the points following as succinctly as possible appellee's answers to the contentions of appellant.

POINTS.

I.

The cost of manufacturing and distributing gas was established by competent evidence.

The appellee is a public service corporation and is under the jurisdiction of the Public Service Commission created by chapter 429 of the laws of 1907 now chapter 48 of the Consolidated Laws of the State of New York (chap. 480, laws 1910). The commission is authorized to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations (subd. 4, §66). The commission on December 8, 1908, made an order promulgating a uniform system of accounts for gas corporations, the requirements of which have the force of law, as determined by the state courts (*People ex rel. Kings County Lighting Co.* v. *Straus*, 178 App. Div. 840, 842) The uniform system of accounts promulgated by the Public Service Commission was received in evidence in this cause (plaintiff's exhibit 1) and is printed in full in the record (pp. 952 *et seq.*). The order of the commission promulgating the system reads:

> "On and after January 1, 1909, every gas corporation shall keep upon its books the accounts prescribed or defined in the hereto annexed schedules, marked 'Schedule A' and 'Schedule B' so far as the said accounts are pertinent to the facts and circumstances of said corporation."

Schedule B provides for five general expense accounts, as follows: production expenses, distribution expenses, street lighting expenses, commercial expenses and general and miscellaneous expenses. Under each of these heads are a number of sub-accounts wherein the expenses are to be classified in detail. Schedule A pro-

vides for a floating capital account for materials and supplies. A gas corporation is obliged to charge to this account the cost of all materials and supplies purchased. When materials are taken out of the materials and supplies account, they are credited thereto at cost and charged to the appropriate expense account. In this way the cost to the company of the material used in each department of its business appears with uniformity each year not only for a particular company, but for all companies maintaining the uniform system of accounts, under the appropriate head in the expense account. Every gas corporation is required to render an annual report to the Public Service Commission showing, among other things, its receipts and expenses during the year (subd. 6, §66).

The object and purpose of the uniform system of accounts authorized by the Public Service Commissions Law of New York and prescribed by the Public Service Commission was the same as that authorized by section 20 of the Act to Regulate Commerce and prescribed by the Interstate Commerce Commission, viz., to furnish full and accurate information as to the expenditures and business methods of the corporations subject to the act,—to display the pertinent financial operations of the company and throw light upon its present condition. (*Kansas City Ry. Co.* v. *U. S.*, 231 U. S. 423, 440; *Int. Com. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194, 211; *People ex rel. N. Y. R. Co.* v. *Pub. Ser. Comm.* 223 N. Y. 373, 378). Appellee established by the testimony of its auditor, who had been in charge of the books for the period in question, that its books had been kept according to the uniform system of accounts and the books so kept were received in evidence (pp. 117-174). The auditor described in minute detail the method of operation and the manner in which the facts appearing in the books were obtained and the entries made. The contents of the books so far as they show the operating expenses for the year 1919 were correctly transcribed by the auditor and appear upon exhibit 2 (p. 154). The

same information for the same year is classified in a slightly different form on plaintiff's exhibit 6 (pp. 154-155, 191). A similar statement taken from the books for the first six months of 1920 was received (plaintiff's exhibit No. 12). These expenses are likewise shown in a slightly different form on plaintiff's exhibit 13 (p. 196).

In addition to the testimony of its auditor, appellee established the correctness of its books by the testimony of Howard C. Hobson, certified public accountant, who made an audit of the books for the years 1919 and 1920. The witness testified that the books had been kept according to the system promulgated by the Public Service Commission and that the transcripts showing the operating expenses for 1919 and 1920 contained in plaintiff's exhibits 2, 6, 12 and 13 were correct (pp. 238, 244). The witness was peculiarly qualified as he had been an accountant in the employ of the Public Service Commission for a number of years, and his testimony reveals the merit of the uniform system of accounts and the necessity of keeping accounts in the way provided in order properly to show the expenses incurred by a gas corporation in the supply of gas.

The books so received in evidence showed in terms of dollars and cents the amounts expended by the appellee in the production and distribution of gas. The books of themselves might not be competent to establish the reasonableness of the prices paid, but they certainly were competent evidence to show the expenditures made by the appellee, based upon the prices of materials for the quantities used, and the amounts paid for labor and services according to the salary and wages paid for the respective periods of employment. Appellee supplied proof as to the reasonableness of prices paid for material and wages for labor and service independently of the books. It also established that the quantities of material used and the time of labor and other employees were reasonable and necessary. Mr. Elsman, vice-presi-

dent of the company, was in charge of the purchase of material and the employment of labor. Gas oil, the principal material used, was purchased in the open market upon the solicitation of bids from all dealers in the commodity and the contracts made were the best obtainable (pp. 268-273). Likewise, generator coal and boiler fuel were purchased by Mr. Elsman in the open market and contracts made only after inviting bids from all responsible dealers (pp. 274-292). Mr. Elsman supervised the employment of labor and the company paid not more than the prevailing rate of wages in the community (pp. 293-299). The witness is experienced in the management of gas plants, and he testified that the business of the company was carried on with the smallest possible number of employees.

Appellee called to the stand three competent witnesses, qualified by long experience in the management of gas corporations, who were familiar with prices of materials and labor and expenses necessarily incurred in the manufacture and distribution of gas. It submitted to each of these three witnesses while on the witness stand statements of its expenses in the years 1919 and 1920 in the manufacture and distribution of gas, and each one of them testified that the expenses so appearing were reasonable and necessary in the manufacture and distribution of gas of the quality supplied by appellee. One of the witnesses, John B. Klumpp, for many years engaged in supervising the operations of thirty gas plants operated in forty cities (p. 234) testified that the quantities of coal and oil used by appellee were reasonable and necessary (p. 352) and that all the expenses were reasonable and in keeping with similar expenses incurred in plants operated by the witness (p. 355). Alton S. Miller, another witness, who had over thirty years' experience in the management and operation of gas plants (pp. 370-1), testified that the quantities of coal and oil used by the company in the eighteen months ended June 30, 1920, were low;

that the results of operations were very good; and that the expenses taken as a whole were very low (pp. 381, 2). Robert M. Searle, who had been engaged in the gas business since 1886, testified that the quantities of material used in 1919 and 1920 showed excellent management, and that the expenses were reasonable in amount and necessary, in his opinion (pp. 428-9).

The defendants did not controvert the testimony adduced by the appellee with respect to the reasonableness of the expenses incurred by it. On the contrary, Mr. Merrifield, the chief gas engineer in the employ of the defendant, Public Service Commission, gave testimony to the effect that appellee's expenditures as they appear upon the exhibits in evidence were reasonable and necessary. He testified that the quantities of generator coal and boiler fuel were reasonable and necessary (pp. 857-9); also that the quantity of oil used per one thousand cubic feet of gas made was reasonable and what he would expect (pp. 866, 7, 8). The amount expended for repairs in the opinion of the witness was reasonable (p. 861). The expenditures for gas-making labor he pronounced reasonable and necessary (pp. 859-60, 869, 870).

We submit that the appellee proved the cost of manufacturing and distributing gas in the only way that such cost could reasonably be established. The books were used to establish the actual expenditures of appellee. The reasonableness of the prices paid was established independently of the books and by competent oral testimony of qualified witnesses. Gas has been manufactured for approximately one hundred years, and carburetted water gas, like that manufactured by appellee, for more than thirty years. The experience gained in the industry has enabled those familiar with it to state the number of gallons of oil and the pounds of fuel that are reasonably necessary to produce a thousand cubic feet of gas. This experience has also enabled those familiar with the industry to state the number of la-

borers and the hours of labor that are necessary in the production of gas. Thus, when appellee established that the quantities used by it of material and the number of days of labor employed were what would reasonably be expected, and that the prices paid for material were the lowest that could be obtained, and the wages paid to labor was the prevailing rate, it established the fact in issue, to-wit, the cost per one thousand cubic feet of manufacturing and distributing gas.

The law required appellee to keep the books in question and to keep them fairly and accurately, and in the absence of evidence to the contrary, it must be presumed that they were so kept.

II.

There were no improper items included in appellee's operating expenses, and appellant's claims that deductions should be made from such operating expenses are not supported by the evidence.

Appellant takes up, under point XI of his brief, various items which he claims were improperly included in appellee's operating expenses and which he contends should have been disallowed by the court. In calling attention to the fact, as appellee has done under the previous point, that all the witnesses examined testified that the quantities of material used and the amount of labor employed were reasonably necessary in the production and distribution of the gas furnished by it, appellee has perhaps made sufficient answer to the various claims made by appellant with respect to alleged improper items included in operating expenses. Nevertheless, appellee will here answer *seriatim* the several claims made by appellant under said point XI (appellant's brief, pages 79-95).

Coal and oil shortages: Appellee's expenditures for generator coal, boiler fuel and gas oil in 1919 and the first six months of 1920 were (plaintiff's exhibits 6 and 13):

1919, generator coal and boiler fuel ...	$304,711.76
1920, " " " " " ...	193,345.48
1919, gas oil	347,171.13
1920, "	273,668.40
Total	$1,118,896.77

Appellant contends that these expenditures should be reduced by sums aggregating $7,860.71, on the claim that appellee accepted and charged into operating expenses

the quantities of coal and oil according to the weights and measurements of the sellers, and not according to its own weights and measurements (appellant's brief, pp. 79-82). It will be observed that the variation is negligible, amounting to about three-fourths of one per cent in terms of money. It is a fact that appellee accepted the railroad weights of coal and the dealers' measurements of oil. The oil contracts (plaintiff's exhibits 19, 20, 21 and 22) provided that the loading of the oil was to be certified to by a representative of the New York Produce Exchange, and the coal contracts (plaintiff's exhibits 23 et seq.) provided that the railroad scales weights shall govern all line deliveries, and loading port weights taken by railroad scales govern in case of delivery by water. Nevertheless, on receipt appellee weighed the coal in three ton lots and measured the oil in the storage tanks (pp. 539, 546). The variation in coal weights might well be accounted for by the fact that in one instance the coal was weighed in 50-ton car-load lots and in the other in lots of three tons. The variation in the measurements in the oil tanks might well be due to the variation in temperature, causing an expansion or contraction in quantity. In any event the variation was so slight as not to warrant a claim for adjustment. Every purchaser of coal in car-load lots agrees to accept railroad weights. In the case of oil the reliability of measurement was assured by the fact that the loading and measurement was certified to by an independent party, the New York Produce Exchange.

Boiler coal: Appellant contends that there was an excessive use of boiler coal and that $7,049.83 should be deducted from the operating expenses for 1919 and $14,232.15 from the expenses for six months ended June 30, 1920(appellant's brief pp.81-83). Boiler coal cost appellee 4.22 cents per thousand cubic feet of gas made in 1919 and 5.27 cents in 1920. (plaintiff's exhibits 6 and 13). It is contended that the cost in each period should have been 3.77

cents per thousand cubic feet of gas made. The only basis for this claimed deduction is that defendant's witness Merrifield expressed the opinion that the unit cost of 5.27 cents in 1920 was high by 1.5 cents per thousand (p. 869). He said, however, that the price of $4.84 per ton paid by appellee indicated to him that the coal was not of good quality. In expressing his opinion that the cost per unit was high, the witness admitted that he failed to take into consideration the fact that the manufacturing facilities in 1920 were overtaxed, due to an excessive demand for gas, and that the machines could not be operated under those conditions as efficiently as otherwise. The witness did not take into account that plaintiff's boiler fuel was required to produce the steam power necessary to send the gas at high pressure to the holders located 1 1/2 miles from the manufacturing works, which is not ordinarily the case (pp. 875-6). The defendants' witness gave no testimony whatsoever that the cost of 4.22 cents in 1919 was excessive, but appellant argues nevertheless that the cost should be reduced by 0.45 cents per thousand cubic feet. Appellee's three witnesses all testified, as pointed out elsewhere in this brief, that the quantity of boiler fuel was reasonable in both 1919 and 1920. Mr. Klumpp, appellee's witness, (pp. 353-6) explains the reason for a greater quantity of boiler fuel being used in 1920, due to the fact that the capacity of the plant was taxed and the gas had to be pumped to outlying holders. Appellant seems to consider that the operating expenses should be reduced to correspond with the opinion of defendant's witness expressed on direct examination, without regard to the qualifications made by him in his cross-examination and without any regard at all being paid to the overwhelming weight of evidence as to the reasonableness of these quantities, as testified to by appellee's three witnesses.

Repair expenses: Appellee's total expense for repair labor and material in 1919 was $73,380.42 and for the first six months of 1920, $60,462.29. Appellant contends that the repair expense in 1919 was excessive by $33,960.54 and in 1920, by $38,980.51, but points to no testimony supporting this claim (appellant's brief pp. 82-84). All the witnesses testified that the expense for repairs for the respective periods was reasonable and necessary. Appellant has taken the aggregate of the expenses for repairs in the 10 year period 1909 to 1918, which shows that the average was $39,492.88 per year, and he would have the court accept this yearly average as the proper amount for repairs in 1919. There are several answers to this, the most obvious of which is that in the period appellee's plant had trebled in size. In 1909 its sales of gas amounted to 520,671,000 cubic feet (defendant's exhibit D 24); in 1919 to 1,279,845,244 cubic feet (plaintiff's exhibit 6); and for the first six months of 1920 to 808,087,058 cubic feet (plaintiff's exhibit 13). Another answer is that the cost of repair material and labor in 1919 was much higher than in prior years. The very basis of the action was that a new level of costs had been reached, making it impossible to manufacture gas for 80 cents per thousand cubic feet. Appellant's contentions with respect to repair expenses, cannot be reconciled with the argument made elsewhere in his brief, where he points out that costs in 1919 and 1920 soared to levels never before reached (appellant's brief pp. 50, 51). Appellant seeks to have the repair expenses for 1920 reduced to the average of the 11-year period preceding, and appellee makes the same answer to this contention as to the like contention for 1919.

Unaccounted for gas: The court held that 15 per cent of the registered make for "unaccounted for" was not excessive. Appellant contends for 8 per cent for "unaccounted for" and asks that the operating expenses be reduced accordingly. Plaintiff's exhibit 52, (p. 1087), shows the "unaccounted for" of fifteen gas companies operating in the state of New York in the years 1918 and

1919. The "unaccounted for" of these companies ranged from 10.7 per cent to 32.5 per cent. Defendant's exhibit D-1 (p. 1088) shows the "unaccounted for" of various gas companies operating in the city of New York in the years 1917, 1918 and 1919. There are four companies listed—Newtown Gas Company, Woodhaven Gas Light Company, Richmond Hill and Queens County Gas Company and Jamaica Gas Light Company—each of whose "unaccounted for" is stated at 8 per cent in each of the three years. This uniformity is of itself significant. Appellant argues that the 8 per cent of these four companies is controlling and should be used in this case. (appellant's brief, pp. 39-40). Appellant, we fear purposely, omits to mention that when exhibit D-1, showing said 8 percent for the four companies in the three years, was received in evidence, a concession was made by the defendants that that percentage was arbitrary and represented nothing so far as actual "unaccounted for" was concerned. The record shows (pp. 599-600):

> "Mr. Moran (plaintiff's counsel): "But I want the further admission from the defendants that in the case of Newtown Gas Company, Woodhaven Gas Light Company, Richmond Hill and Queens County Gas Company and Jamaica Gas Light Company, which report 8 per cent, each one of them in each of the three years,—just exactly 8 per cent of every item—that that is simply an arbitrary figure and does not represent any actual unaccounted for."
>
> Mr. Hill (defendants' counsel): The representative of the attorney general so concedes.
>
> Mr. Moran: Those companies being subsidiaries of the Brooklyn Union Gas Company, and that figure is simply adopted to get at their accountings between the companies of the gas being manufactured and supplied by the parent

company to these subsidiary companies, and that is the figure they used for the purpose."

Four witnesses testified on the subject of "unaccounted for"—three called by appellee and one by the defendants. Mr. Klumpp's testimony on the subject will be found at pages 360-365. He said that there was no standard by which to determine the unavoidable amount of "unaccounted for" of any company (p. 363). He said that if "unaccounted for" exceeded 15% it would be cause for investigation but he would not say that it could be corrected (pp. 364-5).

Mr. Miller, who had over thirty years' experience in the gas business covered the subject exhaustively (pp. 383-395). He said that appellee's "unaccounted for" did not indicate negligence or inefficiency in management (pp. 393 and 394).

Mr. Searle, who had over twenty-five years' experience, likewise testified upon the subject (pp. 429-432). He said that percentages were unreliable in that one company's percentage might be low due to having a few large consumers (p. 429). He gave various causes of "unaccounted for" and said that appellee's "unaccounted for" was not attributable to negligence or inefficiency (p. 431).

More important still is the testimony given by Mr. Merrifield, chief gas engineer of the defendant, Public Service Commission. Mr. Merrifield said that if he were in charge of the company and its "unaccounted for" exceeded 12 per cent, he would not feel comfortable (p. 885). When asked on cross-examination what he would do if it were above 12 per cent, he said he would search for leaks, test his meters, and generally examine the situation. When asked what he would do if it were still over 12 per cent he said he would "think up some other scheme." (p. 889).

The testimony of the several witnesses shows that "unaccounted for" is due to the following causes:

slow registration of consumers' meters; condensation of vapors in the gas due to falling temperature; leakage in the mains and services; contraction in volume due to the differences between the temperature of the gas as it is measured at the station meters and at the consumers' meters, and inaccuracy of estimate of the amount used in street lamps. The percentage of gas "unaccounted for" through the several causes is greater where the mileage of mains is greater in relation to consumption; it is greater when the meters are located in cold cellars of private houses: the percentage will be greater where all the gas is transmitted under high pressure, which tends to increase the condensation. "Unaccounted for" is also dependent upon soil conditions. The sandy soil of the district served by appellee tends to permit gas to escape freely from leaks in the mains and services, which does not occur in the more compact soil of a clay formation. Depending upon so many varying factors which change with different conditions surrounding the distribution of gas in the different localities, it is plain to see that there can be no standard by which to measure the unavoidable amount of "unaccounted for" gas of any company.

Unless appellee's "unaccounted for" is due to inefficiency or bad management amounting to negligence, it cannot be termed excessive or unreasonable. There is not one scintilla of evidence in the record that the "unaccounted for" is due to negligence or inefficiency, and there is no basis whatsoever for the claims made by appellant.

Defendant's witness, as before pointed out, admitted that 12 per cent "unaccounted for" was to be expected and even when it went beyond that he was not sure that it could be avoided.

Auditing expense: Appellee expended yearly $6000 for the services of a supervising auditor and appellant contends that this was not warranted. Appellee does a

gross business of over $1,000,000 per year. Its revenues and expenditures are handled by a multitude of employees. Common, ordinary prudence requires that an independent auditor check these expenditures annually (p. 219). No reason is given for excluding the item, except the mere assertion of appellant's counsel.

Street lighting: Appellee furnishes gas to 3,500 street lamps maintained by the city. Gas so supplied is not metered, but the amount furnished is estimated on the basis that each lamp consumes 3½ cubic feet of gas per hour. The city will not contract on any other basis. It is believed that in the course of a year, these street lamps will consume more than 3½ cubic feet per hour, possibly 4 and in some cases 4½ cubic feet per hour. Appellant contends that this is a loss which should not be absorbed in operating expenses. Appellee's answer is that it is an incident of the business that appellee furnish gas to the city of New York at 75 cents per thousand cubic feet, pursuant to chapter 736 of the laws of 1905. It is impracticable to meter the gas furnished to street lamps. The burden of the loss must be absorbed in the general business.

Uncollectible bills: Appellee's operating expenses are burdened with less than 1 cent per thousand cubic feet of gas sold, for uncollectible bills. It is argued by appellant that there should be no uncollectible bills inasmuch as appellee may require from each consumer a deposit as security for the payment of the bill. In the conduct of a business, even under a statute permitting a deposit as security for payment, it has been found that there is a loss due to uncollectible bills. The great expense of requiring a deposit from each consumer would more than offset the trivial losses sustained. When consumers establish a credit with appellee gas is furnished without the security of a deposit. Some consume gas in excess of the amount deposited. With 40,000 consumers, it is not practicable to discontinue ser-

vice the instant the bill exceeds the amount of the deposit, nor is it practicable to require a deposit from every person. It is submitted that a gas business of the magnitude of that conducted by appellee cannot be carried on with losses for uncollectible bills amounting to less than 1 cent per one thousand cubic feet of gas sold.

Strike towage: Appellee was obliged to pay $1,844.37 in 1920 to secure towage of coal on account of a labor strike. Appellant argues that this was an unusual expense and should be disallowed. It was unusual in the sense that under ordinary circumstances it would not be incurred, but there was a labor strike and appellee found it necessary to pay a premium amounting to $1. per ton in order to get its coal delivered to its plant. If not chargeable to operating expenses, we inquire, how would the expense be met?

Water-gas tar: Appellant contends that $12,120. should be deducted from appellee's operating expenses for 1920 on account of the loss of water-gas tar. In the manufacture of gas there is a residual known as water-gas tar. This water-gas tar is collected and burned under the boilers and takes the place of boiler fuel. In order to show the cost of making gas there is credited to the general production expenses the estimated value of the water-gas tar, and the same is charged to boiler fuel. Due to the inferior grade of gas-oil delivered to appellee in 1920, it was found that the residual was not entirely water-gas tar. A considerable portion of it turned out to be "sludge" and not usable for boiler fuel. The production expenses therefore could not be credited with the same amount for water-gas tar as when a good quality of gas-oil was delivered, and by the same token, boiler fuel could not be charged with as much for water-gas tar. There was less water-gas tar both as a residual and for boiler fuel purposes. Appellee accordingly reduced the credit to production

scribed by calling it mud than calling it oil." He further testified:

> "Q. What do you say as to whether they should have used 3.6 gallons of the kind of oil which they had there for April, May and June?
>
> A. Now, the oil that they used subsequent to April, I don't know what its b. t. u. value is or was. But on the assumption that the— if they had continued using the oil that they had in the early months of the year they should have been able to produce a gas of that 535 b. t. u.'s on approximately one gallon of oil less per M. I don't know either by analysis or by experience what the b. t. u. content of this oil was, or whether 2.6 gallons would produce a gas of this kind." (pp. 866, 867).

As pointed out in the previous point, the four experts, including Mr. Merrifield, testified that the quantity of oil used by appellee in the manufacture of gas in 1919 and 1920 was reasonable and what would be expected.

Appellant makes the general charge that appellee's plant is inadequately equipped and poorly designed; that the management has been inefficient and wasteful (appellant's brief, p. 78). The testimony does not sustain the charge but on the contrary the experts all testified that appellee's plant was properly designed and was adequate for its purposes, except that due to the unprecedented increase in the consumption of gas in the winter of 1919-20, its capacity was overtaxed. (pp. 404-5, 415, 481). A severe winter coupled with the high price of coal and the difficulties obtaining in securing deliveries of coal for domestic uses, caused appellee's consumers to use an unprecedented quantity of gas. The demand on appellee's plant increased more than 35% in a single year (p. 302). Appellee had been unable to finance additions and extensions to its plant on account of the confiscatory rate to which

and reduced the charge to boiler fuel by the amount of "sludge" that developed. There was no increase in expenses or loss in the sense attempted to be contended by appellant. The inferior gas oil received did not produce as much water-gas tar residual for fuel purposes as a good quality of oil would have produced. The result is reflected in appellee's operating expenses of course. The oil dealer did not guarantee the quality of the oil at this period. It was a matter of common knowledge that the oil delivered was of poor quality and appellee was satisfied to get any oil to keep its plant going.

The quantities of gas-oil used: Appellant contends (appellant's brief, pages 90-91), that there should be a deduction from the operating expenses in 1919 of $75,000 and for the first six months of 1920 of $37,500. This claim is predicated upon the assumption that appellee used one gallon of oil more per thousand cubic feet than was necessary to manufacture gas. Appellee used an average of 3.43 gallons per thousand cubic feet of gas made in 1919 (plaintiff's exhibit 6) and 3.6 gallons in 1920 (plaintiff's exhibit 13). Appellant cites the testimony of Mr. Merrifield, Chief Gas Engineer for the Public Service Commission at page 867, in support of his claim that 2.6 gallons were sufficient to manufacture one thousand cubic feet of gas of the quality manufactured by appellee. The testimony does not support the contention. He testified that 3.6 gallons was the quantity necessary to produce the quality of gas made by the appellee in 1919 and in the first four months of 1920 (p. 866). In 1919 and the first four months of 1920 appellee produced gas having upwards of 585 British thermal units per cubic foot (plaintiff's exhibits 17 and 18). In May and June, due to the inferior quality of oil, the gas produced was in the neighborhood of 535 British thermal units. The witness said that a gas of 535 british thermal units could be produced with 2.6 gallons of *good oil*. He said the oil used in May and June was not good oil, might "better be de-

it was subjected by the legislature. The result was that it found its plant overtaxed. It was obliged to operate its gas-making machines for excessive periods without overhauling and its boiler capacity was insufficient (pp. 305-307). Due to lack of plant capacity appellee was unable to accept applications from new consumers, with the result that in September, 1920, there were over 2,000 unfilled applications for service. The public service commission recognized the inadequacy of the equipment and facilities and directed appellee to make changes, alterations, additions and improvements which the Master found would cost $1,740,000. (Master's report, par. 41).

III.

The Fourteenth Amendment to the Constitution of the United States is not suspended during "abnormal times," and under it appellee was entitled to have the enforcement of the statute enjoined until such time as the rate therein prescribed would afford an adequate return.

Appellant contends that the statute should not be declared confiscatory merely upon the financial return obtained in one or two abnormal years. The proof covered the period from January 1st, 1919, to June 30th, 1920. It was found, however, that the appellee would be required to pay substantially higher prices for materials for the second half of the calendar year 1920, than the average prices of the six months ended June 30th, 1920, and its labor costs would also be higher (Master's report, pars. 29 and 38). Thus we have it that the court has found that the cost of manufacture and distribution, without any return upon capital, was in excess of the statutory rate for a period of two years. This was the condition at the date of the decree, to wit, that the statutory rate did not provide for the cost of manufacture and distribution, to say nothing of paying a return upon capital employed. The decree did not irrevocably annul the statute, but granted leave to the defendants to move at the foot thereof to vacate the same whenever conditions changed. A year has since passed and the defendants have not availed themselves of the privilege, presumably because the conditions remain the same. This court has taken judicial notice of price levels (*Lincoln* v. *Lincoln Gas Company*, 250 U. S. 256), and may in this case take judicial notice of the fact that there has been no substantial recession in costs. As the case now stands, there is not one year, but three years, during which the statute did not provide a reasonable or fair price for gas. The Fourteenth Amendment to the Constitution of the United

States stands in all its virility, even though the times be "abnormal", as contended by the appellant.

The argument made loses its force entirely when it is considered that confiscation was shown for the whole period covered by the evidence and was present at the date of the decree, and the decree may be vacated whenever operating expenses recede to the point where the statutory rate will afford an adequate return.

It is one thing to say that an abnormal fiscal year is valueless or of little value when operations for such years are in evidence only as a forecast of the future, and the proof of confiscation is close and doubtful, as this court has said in the cases cited by appellant, and a very different thing to say, as appellant says, that appellee is not entitled to relief from proved present confiscation because present times are abnormal. Past abnormal times may lack value as evidence of future confiscation but it has never been held that present abnormal times excuse present confiscation.

Appellee through the decree before the court on review did not escape regulation as to the rates chargeable by it for gas. Notwithstanding that the legislature of the State of New York by chapter 125 of the laws of 1906, and chapter 604 of the laws of 1916, prescribed a maximum rate of 80 cents per thousand cubic feet for gas supplied in the city of New York, there was also a public service commission, created by chapter 480 of the laws of 1910, with power and authority to fix a maximum price for gas, with the single qualification that the rate fixed by the commission should not exceed that fixed by statute (Public Service Commissions Law, section 72). It was ruled by the Court of Appeals that the commission had no power to fix a rate higher than the statutory rate, even though the statutory rate were confiscatory (*People ex rel. Municipal Gas Company* v. *Public Service Commission*, 224 N. Y. 156). But it has since been held that when the statute is declared confiscatory and unenforceable by a court of competent

jurisdiction, as in this case, this limitation on the power of the commission is removed and it may prescribe a maximum price for gas even though higher than the statutory rate (*Morrell* v. *Brooklyn Borough Gas Company*, 231 N. Y. 398, 404).

Further than this, the legislature by amendment to the Public Service Commissions Law, chapter 134 of the laws of 1921, has conferred upon the commission power to fix a reasonable and proper maximum price for gas notwithstanding that a higher or lower rate has been prescribed by statute. Thus appellee's rate is subject to regulation by the Public Service Commission, and we might urge here that the questions argued by appellant are academic. Even if there were at this time no decree of any court declaring void and unenforceable the statute here in question, the rate for gas furnished by appellee is subject to the regulation of the Public Service Commission despite the statutory rate.

IV.

Appellee's right to relief in this suit is not affected by the fact that through necessity it has furnished a heating quality gas instead of a candle power gas.

By chapter 125 of the laws of 1906 it is provided that *illuminating* gas furnished in the city of New York shall have an illuminating power of not less than twenty-two sperm candles under the penalty of $1,000. for each violation. The Public Service Commissions Law authorized the commission having jurisdiction in the City of New York to fix standards for the measurement of the illuminating and heating power of gas, notwithstanding that another standard may have been fixed by statute (Public Service Commissions Law, section 66, subdivision 3, being chapter 48 of the Consolidated Laws). The commission in October, 1917, issued an order making it optional with gas companies to furnish heating quality gas instead of twenty-two candle power gas for the duration of the war and for three months thereafter, provided the price to the public was reduced according to a schedule stated in the order (plaintiff's exhibit 38, pp. 1061-1065). Appellee did not avail itself of the immunity thus conditioned as it was unable to reduce its price.

Until 1918 appellee supplied twenty-two candle power gas. Since 1918 it has been obliged to furnish heating quality gas, which requires less oil in its manufacture. The reasons for so doing are fully given in the testimony of Mr. Elsman, vice-president (p. 315). Harbor conditions were such in the winter of 1917-18 that the required quantity of oil could not be delivered. Appellee had available to meet its expenses but 80 cents per thousand cubic feet of gas sold and the costs of operation were such that it could not thereafter purchase the required quantity of oil to make twenty-two candle power gas. It continued to supply heating quality gas

from necessity and not from choice. The gas supplied by appellee is used almost exclusively for heating purposes. Heating quality gas is furnished nearly everywhere in this country except in the city of New York (p. 379). The candle power standard has become obsolete and has practically been abandoned. Candle power affects only the illumination furnished by an open flame burner, of which the number in use at the present time is negligible. The principal use to which gas is now put by consumers generally is for heating and cooking and where it is used for lighting it is almost invariably done by means of an incandescent burner, which requires heating and not illuminating power in the gas.

Three witnesses testified with respect to the comparative merits of candle power and heating quality gas. Appellee's witness Mr. Klumpp has made an extended study of the subject and covered it exhaustively in his testimony in this case (pp. 325-335). Heating quality gas is supplied throughout the whole United States except in the city of New York (pp. 326-328). He testified that in order to get efficient service from gas it should be supplied at a uniform heating quality, which is practicable in a heat unit gas, but not in a high candle power gas. Twenty-two candle power gas will vary from 580 to 700 heat units per cubic foot (p. 367). Mr Klumpp testified that the heating quality gas supplied by the appellee was superior to twenty-two candle power gas (pp. 334, 335). Twenty-two candle power gas requires the use of from 4 to 4¼ gallons of oil per thousand cubic feet made (p. 353), while appellee used 3.6 gallons in furnishing heating quality gas.

Appellee's witness Mr. Miller also testified on the same subject and to the same effect (pp. 378-381) and said that the heating quality gas supplied by appellee was more efficient than twenty-two candle power gas.

Mr. Searle likewise testified that the gas supplied by appellee was more efficient than twenty-two candle

power gas and that a heating quality gas was more serviceable for general domestic purposes (pp. 432-435).

The Master on the testimony so given by appellee's witnesses, the defendants in no way disputing it, found the heating quality of gas is more nearly a direct measure of its quality and usefulness, particularly as represents the community served by the appellee; that the heating value standard tends to increase efficiency in consumption by insuring uniformity of quality. He also found that the gas supplied by the appellee was of uniform heating quality, calculated to render to the consumers a service efficient and well adapted to their requirements. (Master's report, pp. 33, 47). Due to the inferior grade of gas-oil supplied to the appellee at times in 1920, it was unable to furnish a uniform quality of gas (Master's report, par. 14 and 15, pp. 33, 47).

In his opinion the Master finds that the reasons for the appellee's varying from the statutory requirement of twenty-two candle power were two fold: (1) its desire to save money by using the smallest possible quantity of gas-oil; (2) the honest belief that gas containing approximately 585 british thermal units per cubic foot was as well, if not better, adapted to the use made by its consumers of the gas purchased from it.

On appellee's motion for an interlocutory injunction made at the inception of this suit heard before a court composed of three judges (Ward, Mayer and Knox), as required by section 266 of the Judicial Code, the court ruled:

> "The failure of the plaintiff to furnish gas of the statutory candle power, or its failure to conform to the requirements of the judgment of the state court, are not reasons for denying it relief against a present rate which is confiscatory. The maxims relied on that he who asks equity must do equity and that he who comes into equity must come in with clean hands, do not apply. They contemplate leaving such a

> plaintiff to its remedy at law, but we know of no remedy at law whereby this plaintiff can recover either from its consumers or from the state of New York any losses which it may sustain by the enforcement of the statutory rate pending final hearing. Against confiscation there must be a remedy somewhere."

In passing upon the exceptions to the Master's report in respect to non-observance of the candle power requirement, Judge Hough said:

> "This plaintiff has (in the language of Judge Learned Hand's recent decision) persistently and deliberately disregarded the candle-power requirement. I think it is proven that it has done so of necessity and has not thereby injured anyone; but that is, after all, beside the point if there be anything in the argument.
>
> But I think there is nothing in the argument unless a plaintiff manufacturer who cannot pay the bills incurred in making his regulated article (without speaking of profit or return) is obliged to cease operations rather than to give the public something, even though that something be not statutory.
>
> This manufacturer might have based its suit on the allegation that the 22-candle-power requirement was in itself confiscatory:—having regard to the admittedly greater expense of complying with the standard of illumination. Both upon reason and authority the exceptions based upon the foregoing argument are overruled."

The candle power requirement is established by the same statute which fixed the 80 cent rate. To fix a rate for illuminating gas without defining the quality would not establish a price. A rate must be for a commodity of a specified quality. Thus, if the rate fixed is not an adequate price for the quality specified, the entire regu-

lation is abortive. In other words, unless the rate is adequate for the quality prescribed, no duty is imposed upon the utility to observe either. When the appellee establishes as it does in this case, that it is unable to make gas of twenty-two candle power for 80 cents per thousand cubic feet, then neither the quality prescribed nor the rate fixed is obligatory. In this connection we wish to point out that there is nothing injurious to the public welfare, the morals or safety of the people in supplying gas of other than twenty-two candle power. There can, therefore, be absolutely no justification for the fixing of a twenty-two candle power standard by statute other than the declaration of the legislature that 80 cents is the maximum price to be charged for gas of that quality. The regulation fixing a candle power requirement has no other basis for its support than the exercise of the police power of the state in fixing and establishing fair and reasonable rates for gas of that quality.

It seems fairly obvious that the standards of illuminating power and of pressure in the statute are regulations of the same category and are defined by the act merely as incidents of the rate fixed thereby. They are thus dependent parts of the main or rate enactment and cannot be separately sustained. While it is possible in a proper case that the rate requirement might be sustained and the pressure requirement condemned, as was done by this court in the *Willcox* case (212 U. S. 19, 53), the rate requirement could not be condemned and the pressure or candle power requirements sustained, for the latter requirements are but incidents of the former. But whether this is so or not, it has been held by this court that the pressure requirement cannot be sustained when compliance therewith would increase the corporation's expenditures to a point where no return could be obtained at the statutory rate. In such an event it was held in the *Willcox* case (*supra*) that the pressure requirement was void. In the case at bar, it clearly appears that compliance with the candle power requirement would have in-

creased the cost of producing gas from 6 to 10 cents per thousand cubic feet, by reason of the additional gas-oil required to make 22-candle power gas. When it was costing from 84 cents to 96 cents to make the less expensive heating quality gas, it could only have added to the cost and so to the confiscation, to have complied with the candle power requirement. As the pressure requirement was void under such circumstances, so the candle power requirement was void.

While it was held in the *Willcox* case, that the candle power requirement was not void, it was not shown in that case, as it was shown here, that compliance with it made the rate confiscatory or added to the confiscation already present without such compliance. When it was costing more than 80 cents to make heating quality gas it was surely incompetent for the legislature to require appellee to make a more expensive gas for 80 cents.

The statute (chapter 125 of the laws of 1906) fixes its own penalties which are exclusive. The public authorities have been aware at all times of appellee's practice in this regard, and were at liberty to institute penalty proceedings. They acquiesced in the furnishing of the heating quality gas knowing the necessity for its service and thereby ratified and directly approved appellee's acts, and may not now be heard to condemn them (*People* v. *Stephens*, 71 N. Y. 527, 551-2).

In any event, equity will not assist in the recovery of a penalty (*Livingston* v. *Tompkins*, 4 Johns. Ch. 415, 431, 432), and could not well deny the relief here sought because penalties collectible elsewhere had accrued against appellee.

Assuming that appellee was guilty of the contumacious conduct with which it is charged by counsel for appellant, it was in no worse plight than if it had been adjudged in contempt. Indeed, that, or near that, is apparently what counsel conceives was the case, yet a court of equity may not refuse relief even to one in contempt (*Hoxen* v. *Elliott*, 167 U. S. 409).

The maxim that "he who comes into equity must come with clean hands", has no application to appellee here. That principle assumes that a suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence,—that he has violated conscience and good faith in regard to or connected with the matter in litigation (Pomeroy, 2nd ed. section 397). Appellee has not violated conscience or good faith. On the contrary, it has furnished gas suitable to the needs of its consumers and of more value to them than the 22-candle power gas required by the statute. For it, under the circumstances and in the face of the great scarcity and high cost of gas-oil, to have insisted upon furnishing and charging the cost of 22-candle power gas to its consumers would have violated conscience and good faith. Conscience and good faith required it to meet the emergency confronting it and its consumers, as it did meet it, namely, by conserving its own and its consumers funds by substituting the less expensive but more useful heating quality gas for the expensive and wasteful 22-candle power gas.

The doctrine of unclean hands cannot apply to a case where a party seeks relief from an unconstitutional statute. The appellee appeals to the court for the protection of its property and legal rights and the question whether or not it shall be relieved by the court is one to be determined upon legal principles and not upon equitable considerations. It insists that it shows a strict legal right to be relieved from the operation of the statute and it comes into equity only because it is in that forum alone that adequate relief can be afforded and thereby a multiplicity of suits and the general disorder and confusion which result therefrom avoided (*Missouri* v. *Chicago, Burlington and Quincy R. R. Co.*, 241 U. S. 533. *Ohio Valley Water Co.* v. *Ben Avon Borough* 253 U. S. 287).

The doctrine of unclean hands implies fraud and deceit on the part of a suitor seeking equity but there has been no fraud or deceit on the part of the appellee. Openly and from necessity it has furnished the heating quality gas. It would have been to its advantage to furnish the twenty-two candle power gas, thus increasing its expenses by approximately 6 cents for each one thousand cubic feet of gas sold in 1919, and by approximately 10 cents in 1920, and making a stronger case of confiscation. What it has done has not been to its own advantage but rather to the advantage of the consumers and without the slightest degree of prejudice or injury to them. The gas they received under the proof was more efficient than a twenty-two candle power gas.

Appellee's utility is an instrumentality for the purpose of supplying the public with a necessary commodity and appellee is incompetent to do any act which will render it impossible to perform its public functions. If the rate prescribed by the statute is so inadequate as to render it impossible for appellee to supply gas, appellee must apply to the court to have the statute condemned and its enforcement suspended. There is no other avenue of relief and the relief is necessary. Nothing that the appellee could do could incapacitate it to so apply to the court. The appellee is not competent to surrender any right or by any act to deprive the court of the power it has under the constitution to condemn any and every statute which is in violation of that instrument.

Appellee has so far met the argument of the appellant on the assumption that the twenty-two candle power requirement is applicable to the gas furnished by appellee. It will be observed, however, that chapter 125 of the laws of 1906 deals exclusively with *illuminating* gas. The act is entitled "An Act in relation to illuminating gas." The prices fixed are prices to be charged by "a corporation, association, copartnership or person engaged in the business of manufacturing, furnishing

or selling *illuminating* gas." Section 2 reads: "The *illuminating* gas furnished by any such corporation, association, copartnership or person shall have an *illuminating* power of not less than twenty-two sperm candles." The appellee since January 1, 1918, has not manufactured, furnished or sold "*illuminating* gas." The gas manufactured and sold was *heating quality* gas. It was not furnished for *illuminating* purposes but for *heat producing* purposes and was so used by appellee's consumers according to the uncontradicted testimony. Even the gas used in the mantle burners of appellee's consumers was used for heat producing purposes, that is, to heat to incandescence the mantle which shed the illumination. The statute does not prevent the furnishing of heating quality gas and fixes only the quality and price of illuminating gas when furnished by corporations, associations, copartnerships or persons engaged in the business of manufacturing and furnishing such. As the appellee was not engaged in the business of furnishing illuminating gas, the requirements of the act as to quality of illuminating gas do not apply to it. By this legislation, neither a price nor a standard of quality is established for the gas furnished by the appellee.

V.

The adjudication and judgment in the state court did not preclude appellee from commencing and maintaining this action.

In June, 1916, the appellee commenced an action in the Supreme Court of the State of New York to enjoin the enforcement of the acts of 1906 and 1916, here involved, on the ground that said acts were or would become confiscatory upon the taking effect of the act of 1916 on July 1, 1916. That action was tried and resulted in a judgment entered March 29th, 1920 dismissing appellee's complaint upon the merits, "without prejudice to the commencement of a new action, if, in the future, after an adequate experimentation under an 80 cent rate, it believes it can prove that the rate is confiscatory as to it." (p. 1150).

The taking of testimony in that case was concluded in April, 1919, but the opinion of the court was not handed down until January 27th, 1920. Before the decision was signed or judgment entered therein appellee moved to reopen the cause to enable it to put in evidence proof of the expense of making and distributing gas for the year 1919, which proof had not been available to it at the conclusion of the trial in April, 1919. This motion was denied, the court holding in its opinion filed (copy of which is appended hereto) that, "a denial of such motion does not preclude the plaintiff from bringing an action for the years not embraced within the decision of this case."

Appellee's appeal from the judgment so entered has been argued but has not yet been decided.

During the pendency of that action, appellee under an injunction order made *pendente lite*, collected 95 cents per thousand cubic feet, 15 cents of which was impounded to await the outcome of the action. The injunction *pendente lite* terminated on the entry of final

judgment March 29th, 1920, and after that date no part of the charges made and collected was impounded (pp. 38, 1105 et seq.).

In considering the questions involved in the state court action, the learned court erroneously confined itself to the three years 1916, 1917 and 1918, concerning which definite proof of costs of operation were introduced. It was the duty of that court to take into consideration the costs of operation, not only as they stood at the time of its decree, but as they were likely to continue thereafter (*Lincoln Gas Company* v. *Lincoln*, 250 U. S. 256). It was believed that the testimony before the court in that case sufficiently advised it of the trend of costs which were higher than at the conclusion of the testimony in April, 1919, if the court was not obliged to take judicial notice of such costs as this court did in the *Lincoln* case (supra).

However, the judgment of the state court while it remains unreversed is no doubt conclusive that the money so impounded belongs to appellee's consumers from whom it was collected.

> *Missouri* v. *C. B. & Q. R. Co.*, 241 U. S. 533;
> *Minneapolis etc. Ry. Co.* v. *Merrick Co.*, 254 U. S. 376.

But such judgment is not *res adjudicata* of the issues in this case. The averments of the complaint in that action were held unsustained by the proof, and nothing more was decided. The judgment was not, and there is no finding, that the acts of 1906 and 1916 were compensatory, valid or constitutional, but the findings were that it was not shown by the proof made that they were confiscatory and invalid, and the complaint was dismissed without prejudice. That is, without preclusion of the right to show them invalid when attempted to be enforced at a subsequent period.

> *Vandalia R. R. Co.* v. *Schnull*, 255 U. S. 113, 123.

This action was commenced in May, 1920, and the question presented in this case was not whether the statutory rate was confiscatory in 1919, but whether it was confiscatory at the date the decree was made, to wit, October 19, 1920. The object of the appellee's seeking a decree was not to recoup past losses, but to protect itself against present and future confiscation. To establish the fact of present and probable future confiscation it was obliged to show what was the cost of manufacturing and distributing gas and what return it was entitled to under the constitution upon the property employed in the service. To do this it proved the cost of manufacturing and distributing gas in the calendar year 1919 and the first six months of 1920, which were the costs available at the time of trial in August and September, 1920. It also showed, and the court found, that costs had increased at the time of the trial above what they were during the eighteen months concerning which specific and definite proof was offered. The court also found that the level of costs was likely to continue in the future. On this showing and upon these facts, the appellee was entitled to a decree and there was nothing in the judgment in the state court in the nature of *res adjudicata* that prevented the District Court from awarding the decree as it did.

The phrase added to the clause dismissing the complaint without prejudice to the commencement of a new action, viz. "if in the future, after an adequate experimentation under an 80-cent rate it believes it can prove that the rate is confiscatory as to it", cannot operate to prevent the commencement and maintenance of this action, though it had been found here that the appellee has not actually experimented under an 80-cent rate. It was not competent for the state court to require appellee actually to experiment under an 80-cent rate as a condition precedent to its right to commence a new action restraining the future enforcement of the statutes. The court had no jurisdiction and no

power to impose such a rule upon appellee. No such issue was tendered or tried in the case, nor had the appellee any hearing thereon. As to the power of the court to make such a rule, the Court of Appeals of New York has said:

> "Our opinion is, that the right to prosecute, or to plead in or defend an action, may not be taken away without a hearing, and that neither a general rule nor an anticipatory order, will stand in the place of notice and opportunity to be heard". (*Rice* v. *Ehele*, 55 N. Y. 518, 524).

Such a rule or order is equivalent to a pronouncement that appellee can prove confiscation under the acts of 1906 and 1916 only by proof of adequate experimentation under the rate established by those acts; in other words, only by subjecting its property to actual confiscation. The acts do not so provide; nor would it have been competent for the legislature of New York to have so provided. Under both the State and Federal Constitutions the rate established must be compensatory, and whether it is or not, is a judicial and not a legislative question.

> *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327;
> *Chicago etc. Ry. Co.* v. *Minnesota*, 134 U. S. 418;
> *Missouri* v. *C. B. & Q. R. R. Co.*, 241 U. S. 533;
> *Oklahoma Operating Company* v. *Love*, 252 U. S. 331;
> *Ohio Valley Water Company* v. *Ben Avon Borough*, 253 U. S. 287;
> *Municipal Gas Company* v. *Public Service Commission*, 225 N. Y. 89.

The legislature could not thus prescribe rules of decision to the courts (*United States* v. *Klein*, 80 U. S. 128,

146), and one court may not thus anticipate and dictate the decision of another court.

If the legislature could not constitutionally limit appellee's right to a judicial inquiry into the adequacy of the rate to proof of actual experimentation under the rate, how can a court do it? As this court said in *Horen v. Elliott*, (167 U. S. 409, 417):

> "If the legislative department of the Government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent."

No matter what form judicial proceedings may assume, there is a principle which no proceeding entitled to respect as being judicial can transcend, that "the *allegata* and *probata* must reciprocally meet and conform to each other", and the judgment must respond to the issue made and proved (*White v. Ward*, 157 Ala. 345; 47 So. Rep. 166).

> "A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determina-

tion of his rights and is not entitled to respect in any other tribunal" (*Windsor* v. *McVeigh*, 93 U. S. 274, 277).

The period covered by the hearing and proof and concluded by the decree, antedated the decree. (*Missouri* v. *C. B. & Q. R. R. Co.*, 241 U. S. 533, 539). There was no issue and no hearing in the state court upon the right of the appellee to commence actions in the future to protect its property from the future operation of the acts in question. The language incorporated into the decree limiting appellee's right to commence actions in the future affecting the future operations of the acts, was, in the words of this court, but an "arbitrary edict, clothed in the form of a judicial sentence" (93 U. S. 278).

It is no answer to say that the state court had jurisdiction of the cause, of the subject matter, and of the parties, because it was still limited in its modes of procedure and in the extent and character of its judgment to the issues arising in that cause. It must act judicially in all things and could not transcend the power of that jurisdiction. The judgment of a court transcending the limits of its authority is absolutely void (*Windsor* v. *McVeigh*, 93 U. S. 274, 282). The principle that a judgment must be responsive to the issues presented underlies all litigation. The inquiry is always open as to whether the judgment rendered was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it (*Reynolds* v. *Stockton*, 140 U. S. 254, 264, 268). In that case this court quoted and approved the opinion in *Munday* v. *Vail*, (34 N. J. L. 418) as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes*, where it was said:

> "'A defect in a judgment arising from the fact that the matter decided was not embraced

> within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests, which they choose to draw in question, that a power of judicial decision arises.' And again: 'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard.' "

As the Court of Appeals of New York has said, the statutes were of continuing operation, but upon the implied condition that the rates shall remain in force at such times and at such only as their enforcement will not work denial of the right to a fair return. When the return falls below that level the regulation is suspended. When the level is again attained the duty of obedience revives (*Municipal Gas Company* v. *Public Service Commission*, 225 N. Y. 89, 96). The controversy is as continuing as the act which breeds it and no more ceases to be justiciable because once adjudicated than it ceases to be justiciable when confiscation is postponed. Justiciable controversy inheres in and runs with the act, and the appellee had the constitutional and historic right at any time after the judgment of the state court was entered, when confiscation was again threatened, to the judgment of the courts, and the facts and issues then and there to be presented could not be prejudged by the prior decree

In the *Municipal Gas Company* case at page 96 Judge Cordozo said:

> "A statute prescribing rates is one of continuing operation. It is an attempt by the legislature to predict for future years the charges that will yield a fair return. The prediction must square with the facts, or be cast aside as worthless. * * * It must square with them in one year as in another, at the beginning but equally at the end. In all such legislation, from the hour of its enactment, there thus inheres the seed of an infirmity which the future may develop. It is the infirmity that always waits upon prophesy; the coming years must tell whether the prophesy is true or false. * * * Into every statute of this kind we are to read, therefore, an implied condition. The condition is that the rates shall remain in force at such times and at such only as their enforcement will not work denial of the right to a fair return. When the return falls below that level, the regulation is suspended. When the level is again attained the duty of obedience revives. There would be no obscurity about this if the condition were expressed. It is no less binding because it is implied. The Constitution is the supreme law; and statutes are written and enforced in submission to its commands."

It is thus beyond the power of any court by its judgment to foreclose a party from seeking relief thereafter if confiscation can be established by competent evidence. On the facts in this case the cost of making gas had increased over 30 cents per thousand cubic feet between 1918, the last year considered by the state court in making its decision, and the time the decree was rendered in this case. Such costs even had greatly increased between the 29th day of March, 1920, the date the state

judgment was rendered, and the 19th day of October, 1920, the date the decree in this case was made. The decree in this case affords the appellee no relief prior to the date of its entry, except to relieve it from prosecution for penalties for charging more than 80 cents subsequent to March 29th, 1920. Up to that date the decree of the state court is conclusive and the appellee must get its protection for everything prior thereto from that decree.

It is unnecessary for a court in dismissing a complaint to provide that its judgment shall be without prejudice to another action when circumstances warrant another action, for such is the legal effect in any event. (*Lincoln Gas Company* v. *Lincoln*, supra, p. 268).

It is now the settled law that from the power to fix rates results the duty to provide the opportunity of testing their repugnancy as a unit to the Constitution in case confiscation is charged.

> *Chicago &c. Co.* v. *Minnesota*, 134 U. S. 418;
> *Missouri* v. *C. B. & Q. R. R. Co.*, 241 U. S. 533;
> *Oklahoma Operating Company* v. *Love*, 252 U. S. 331;
> *Ohio Valley Water Company* v. *Ben Avon Borough* 253 U. S. 287;
> *Municipal Gas Company* v. *Public Service Commission*, 225 N. Y. 89, 101, 102.

A party producing competent evidence establishing the fact of confiscation is entitled to relief. To require the party challenging the statute to establish confiscation by showing actual losses while experimenting with the rate is to deny due process of law. The District Court had before it sufficient competent evidence to support the finding of confiscation. The Supreme Court of New York was wholly without power to decree or determine the quality of evidence or the competency of evidence that might be used by the District Court in de-

terminning the issue presented to it; nor was it competent for the state court to prescribe a condition precedent to the institution of a subsequent action by the appellee to secure relief from confiscation, if confiscation could be established by competent evidence. Such was not the intention of the state court, for in denying the motion to reopen the case, it ruled that such denial "does not preclude the plaintiff from bringing an action for the years not embraced within the decision of this case." This action is brought "for years not embraced" within the decision in the state court. As we have seen, and as the authorities cited clearly hold, the decision in that case is limited to and is conclusive upon all parties as to the period from the institution of the action to the date of the rendition of the judgment, to wit, March 29th, 1920, while the decree in this suit granted relief from present and further confiscation.

But if the decree of the state court does prescribe as a condition precedent to the bringing of another action that appellee show confiscation through adequate experimentation, our reply is that appellee has alleged and proved performance of the condition. It is conceded by the defendants that at all times since January 1st, 1919, appellee had a plant and property employed in the public service of the value of at least $3,300,000. The court has found that the actual operating costs per thousand cubic feet were at least 84 cents in 1919, and at least 96 cents in the first six months of 1920, and were higher at the date of the decree. Thus the revenue from the sales of gas at the statutory rate of 80 cents was not sufficient since January 1, 1919, to meet the actual cost of manufacture and distribution, without any return upon capital. In 1920, the revenue from sales at the 95 cent rate was not sufficient to meet the cost of manufacture and distribution, without any return upon capital. At no time since January 1, 1919, was the revenue at the 95 cent rate sufficient to meet the costs of operation and pay a fair return upon the

conceded value of the property. Appellee, therefore, has demonstrated by actual experimentation that a 95 cent rate has been inadequate and confiscatory since January 1, 1919. The demonstration by actual experimentation that a 95 cent rate is inadequate is a demonstration that any rate lower than 95 cents is inadequate and confiscatory. (*Louisiana R. R. Comm.* v. *Telephone Co.*, 212 U. S. 414, 423, 426).

In cases where the inadequacy of the return afforded by a statutory rate was in doubt, this court has frequently refused to enjoin the rate in the absence of experimentation under it, but it has never held as the state court held that experimentation under the rate was an essential prerequisite to relief from its operation. On the contrary, this court has affirmed judgments restraining the enforcement of such rates where there had been no experimentation and where the proof was even less conclusive than it is in the case at bar (*Smyth* v. *Ames*, 169 U. S. 466, 528; *Louisiana R. R. Comm.* v. *Telephone Co.*, 212 U. S. 414; *Denver* v. *Denver Water Company*, 246 U. S. 178). We submit, therefore, that the prior adjudication was not a bar to the commencement of this action.

VI.

There was no error in the admission or exclusion of evidence.

Under his point XII appellant enumerates five matters of evidence that he claims were improperly dealt with at the hearing.

(1) It is contended by appellant that appellee's books of account were improperly received in evidence. We have discussed the competency of the books in our point I. The books were competent for the purposes for which they were used.

(2) The Master excluded evidence which was offered by defendants in support of the findings and judgment made in the state court action. The conclusiveness of the state court judgment would be the same whatever the character of the evidence taken upon that trial. Under no possible theory was it error to exclude the evidence offered.

(3) The Master excluded certain correspondence between appellee and the various dealers in gas-oil relating to possible purchases of oil. Appellant argues that the correspondence so excluded would show that appellee's efforts to obtain oil contracts were merely perfunctory and not in good faith. Appellant has not seen fit, however to have the excluded correspondence printed in the record and we cannot perceive how this court can determine the competency of the evidence not knowing its character. Whether appellee made an effort to secure gas-oil at the best possible prices is of no consequence if the oil contracts made were the best that could be obtained. Notwithstanding the exclusion of the correspondence in question, defendants were at liberty to call witnesses on the subject of oil prices to show that appellee paid more for oil than necessary. This the defendants failed to do and there was, therefore, before the court

no issue of fact with respect to what were reasonable and necessary prices for oil. Appellant cannot complain because evidence was excluded on a matter over which he did not controvert the oral testimony of appellee's witnesses.

(4) The Master excluded defendant's exhibit D 24 for identification. This exhibit showed appellee's financial transactions in the period 1904 to 1916. What possible relevancy appellee's revenues and expenses in a period antedating the enactment of the statute fixing 80 cents for gas had, is not apparent, and appellant fails to indicate in any way how the defendants' case was prejudiced by the exclusion of the evidence. During all the period appellee's rates were fixed by statute and it is not to be presumed that such rates were excessive. Past profits cannot be drawn upon to make present confiscation lawful.

(5) We do not understand what point appellant attempts to make by calling attention to defendants' effort through the witnesses Howard and Mitchell to prove that the Public Service Commission was not able properly to examine the accounts and records of appellee which were open to inspection and examination. The Public Service Commission is charged with the duty of supervising the business of appellee, and for that purpose is given authority by the several provisions of the Public Service Commissions law to examine its books of account and other records. The failure of the commission, through want of funds or otherwise, properly to discharge its duties does not justify confiscation.

VII.

The decree appealed from should be affirmed.

Respectfully submitted,

INGRAHAM, SHEEHAN & MORAN

Solicitors for Appellee.

SAMUEL F. MORAN,
JOHN D. MONROE,
of Counsel.

New York, November 9th, 1921.

APPENDIX A:

Chapter 125 of the Laws of 1906, of the State of New York.

AN ACT in relation to illuminating gas in the city of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation.

Became a law, April 3, 1906, with the approval of the Governor. Passed, three fifths being present. Accepted by the city.

The People of the State of New York represented in Senate and Assembly, do enact as follows:

Section 1. A corporation, association, copartnership or person engaged in the business of manufacturing, furnishing or selling illuminating gas in the city of New York, except in the fifth ward of the borough of Queens and in that portion of the borough of the Bronx formerly contained in the towns of Eastchester and Pelham, shall not charge or receive for gas manufactured, furnished or sold in said city a sum per one thousand cubic feet in excess of the following rates:

1. In the borough of Manhattan, in the first ward of the borough of Queens, in the borough of Brooklyn except the thirtieth and thirty-first wards thereof, and in the borough of the Bronx, except that portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, eighty cents.

2. In the second and fourth wards of the borough of Queens, and in the thirtieth ward of the borough of Brooklyn, one dollar.

3. In the third ward of the borough of Queens, in the thirty-first ward of the borough of

Brooklyn, and in the borough of Richmond, one dollar and twenty-five cents for the remainder of the year nineteen hundred and six; one dollar and twenty cents during the year nineteen hundred and seven; one dollar and fifteen cents during the year nineteen hudred and eight; one dollar and ten cents during the year nineteen hundred and nine; one dollar and five cents during the year nineteen hundred and ten; and one dollar thereafter.

4. In that portion of the borough of the Bronx formerly contained in the town of Westchester, outside of the villages of Wakefield and Williamsbridge, one dollar and fifteen cents during the years nineteen hundred and six, nineteen hundred and seven and nineteen hundred and eight; one dollar and ten cents during the year nineteen hundred and nine; one dollar and five cents, during the year nineteen hundred and ten; and one dollar thereafter.

§2. The illuminating gas furnished by any such corporation, association, copartnership or person shall have an illuminating power of not less than twenty-two sperm candles of six to a pound, burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains of ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. The pressure of illuminating gas in any service mains in the said city at any distance from the place of manufacture shall not be less than one inch, nor more than two and one-half inches.

§3. Any corporation, association, copartnership or person violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to the people of the state.

§4. This act shall not apply to gas furnished or sold to the city of New York.

§5. Chapter three hundred and eighty five of the laws of eighteen hundred and ninety-seven, entitled "An act to regulate the price of illuminating gas in cities of fifteen hundred thousand inhabitants," and all other acts or parts of acts inconsistent herewith are hereby repealed.

§6. This act shall take effect on the first day of May, nineteen hundred and six.

Appendix A:

Chapter 604 of the Laws of 1916, of the State of New York.

AN ACT to amend chapter one hundred and twenty-five of the laws of nineteen hundred and six, entitled "An act in relation to illuminating gas in the city of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penality for violation," in relation to price of gas to consumers in such city.

Became a law May 19, 1916, with the approval of the Governor. Passed, three-fifths being present. Accepted by the City.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions one, two and three of section one of chapter one hundred and twenty-five of the laws of nineteen hundred and six, entitled "An act in relation to illuminating gas in the city of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation," are hereby amended to read, respectively, as follows:

1. In the borough of Manhattan, in the first ward of the borough of Queens, in the borough of Brooklyn and in the borough of the Bronx, exthat portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, eighty cents.

2. In the second, third and fourth wards of the borough of Queens, and the borough of Richmond, one dollar.

§2. This act shall take effect July first, nineteen hundred and sixteen.

APPENDIX B:

Opinion of State Court filed in denying motion for leave to put in evidence expenses for 1919.

GREENBAUM, *J.*

Plaintiff moves for leave "to put in evidence all its expenses for manufacturing and distributing gas in 1919 and all relevant facts with respect to the present and future cost to plaintiff of manufacturing and distributing gas in the territory served by it." Defendants have interposed counter-affidavits in which many of the material allegations of the plaintiff are controverted. The Court is of the opinion that its discretion should not be exercised in favor of the plaintiff upon this somewhat unusual motion. It is evident that the granting of this motion, which is not based upon the ground of newly discovered evidence, nor of any alleged error upon the trial would indirectly result in the retrial of the action.

There is another serious objection to granting this motion. The Court has decided that plaintiff has failed to comply with the Statute requiring it to furnish gas in accordance with the statutory standard of 22 candle power and has also failed to experiment under the 1916 Act, which established the 80 cent rate and which would require a denial of the relief sought in this action.

Another result of the granting of the motion would be an interminable prolongation of the trial, which was unduly protracted and which has long since been disposed of.

Moreover, the granting of this motion would result in the practical nullification of the decision heretofore made. With the view of possibly according relief to plaintiff for the years 1919 and 1920, the Court invited the respective parties to its Chambers. The differences between the parties were absolutely irreconcilable and

the attempt of the Court to compose these differences proved abortive. There is no alternative but to dispose of this motion, which must be denied. The denial of the motion does not preclude plaintiff from bringing an action for the years not embraced within the decision of this case. The motion is denied.

Supreme Court, U. S.
FILED
NOV 14 1921
WM. R. STANSBURY
Clerk

Supreme Court of the United States

October Term—1921

No. 295

CHARLES D. NEWTON, as Attorney-General of the State of New York; LEWIS NIXON, constituting the Public Service Commission of the State of New York, for the First District; and HARRY E. LEWIS, as District Attorney of Kings County,

Appellants,

against

KINGS COUNTY LIGHTING COMPANY, *Respondent.*

REPLY BRIEF ON BEHALF OF APPELLANT NEWTON, AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK.

CHARLES D. NEWTON,
Attorney-General of the State of New York, Capitol, Albany, N. Y.

WILBER W. CHAMBERS,
Solicitor for Appellant Attorney-General, Capitol, Albany, N. Y.

WILBER W. CHAMBERS,
CHARLES E. BUCHNER,
of Counsel.

(38567) M. B. Brown Printing & Binding Co., New York

Supreme Court of the United States.

CHARLES D. NEWTON, as Attorney-General of the State of New York; LEWIS NIXON, constituting the Public Service Commission of the State of New York, for the First District; and HARRY E. LEWIS, District Attorney of Kings County,

Appellants,

vs.

KINGS COUNTY LIGHTING COMPANY,

Respondent.

Reply brief on behalf of Newton as Attorney-General of the State of New York.

The brief of the appellee (pp. 2 and 3) assumes that it is necessary to make a statement of the case since "the brief filed by counsel for the appellant Newton does not contain a statement thereof." This Court is respectfully referred to pages 1-7 of appellant Newton's brief wherein is contained a full and complete statement of the case in accordance with Rule 21. It is substantially the same as appellee's "Statement of Case" but given with greater detail and accuracy. Appellee's apprehension in this respect is entirely unfounded.

The appellee raises the objection that the appellant's brief "does not contain a specification

or errors" in accordance with Rule 21 of this Court. This is an appeal from the District Court direct to this Court and the appellant has followed the procedure set forth in Rule 35 for such cases provided. It filed with the clerk of the Court below an assignment of errors "which set out separately and particularly each error asserted and intended to be urged." The assignments were made "part of the transcript of the record" and were printed with it (Rule 35). These assignments are found on pages 80-92 of the record filed with this Court and set forth with particularity and in detail the errors to be relied upon. There are 57 such assignments of error covering 12 printed pages of the record. The appellant did not re-print these assignments in its brief and does not consider that the rules of this Court so provide. Such a procedure would be a useless duplication of matter before the Court in the transcript of the record on appeal.

Under the caption "Cost of Producing and Distributing Gas" (appellee's brief, p. 4, 5) the Master's prophecy concerning the expectancy of continued high price levels for materials and labor used in the gas business is referred to. The fallacy of such a prediction was pointed out in appellants' main brief, pp. 51-59. This Court will undoubtedly take judicial notice of the very patent fact of daily life that prices generally have fallen considerably during this current year. This is particularly so, as pointed out in our main brief, in regard to gas oil which goes to make up about 50% of the cost of making gas. During the instant litigation gas oil was selling in New York City at 10-12¾ cents a gallon, while today the gas companies in the City of New York have contracted

for the purchase of gas oil at prices ranging from 5-6 cents a gallon. Price levels of general commodities, according to reports of such mercantile agencies as Dun's and Bradstreet's, have fallen over 40% since the high mark of February, 1920. The test of time, infallible and convincing, has shown beyond argument that *at least the prophecy* of the Master upon the question of continuing high costs was erroneous.

Answering Appellee's Point upon Failure to Obey the Candle-power Statute.

Appellee attempts to justify what Judge Hough styled its "persistent and deliberate disregard of the candle-power requirement" (p. 71) by extraordinary sophistry. It is argued:

Firstly: That the candle-power statute was obsolete and therefore this appellee, setting its judgment above that of the law-making body of the State of New York, ignored the requirements of the law and set up another and different standard of gas measurement. It neglects to state that it could have legally and lawfully changed its standard of gas measurement by (1) during the war period taking advantage of the order of the Public Service Commission permitting a change to the British Thermal Unit Standard or (2) after the war taking advantage of the amendment of the Public Service Commission's Law (Section 66, Subdivision 3) effective May 14, 1913. But the appellee preferred to disregard the law although the way was clearly open at all times to change to a heating standard if it honestly and in good faith desired to do so. But possibly supplying gas of a candle-power of from 3 to 8 units as it did in the

month of June, 1921, and charging 95c per thousand cubic feet for it (15 cents above the statutory maximum) was more profitable than a lawful change of standard which might have fixed certain limitations and safeguards as did the order of the Public Service Commission of 1917 (p. 1061, Plaintiff's Ex. 38). The Kings County Lighting Company chose "the easier way," the way of the lawbreaker, and cannot complain if a Court of Equity will not now intervene in its behalf.

Secondly: It is argued that something just "as good" was supplied as 22 candle-power gas. The appellee had no right to substitute under the law, but granting, for a moment, for the sake of argument, that it had, its contention that a gas equally useful was supplied is not in accordance with the record facts. The master found that a gas of a 22 candle-power contained 620 B. T. U's or more. The order of the Public Service Commission of 1917 and the opinion of the Chairman of the Commission, the Hon. Oscar S. Straus, found that the equivalent of a 22 candle-power gas was a gas of 650 B. T. U's.

> "This Commission hereby fixes a monthly average total heating power of not less than 650 British Thermal Units" (p. 1063).
>
> * * * * * * * *
>
> "Each test to determine the heating quality of gas shall be made * * * not less than one-half mile distant in an air line from any manufacturing or distributing station of the gas corporation" (p. 1063).
>
> "Any company may, * * * have the option to adopt * * * a thermal content of 650 B. T. U.'s per cubic foot to be furnished at statutory rate. *This, in the opinion of the Commission, * * * represents as nearly as can now be determined, the thermal content*

of gas now furnished under the legal requirement of 22 candlepower" (p. 1076).

The appellee never served gas of such a thermal content. The Company's own tests and figures as found by the Master (p. 31) shows a very substantial variance from this B. T. U. Standard and these were tests *taken at the works* by the Company. At one-half mile from the works, as provided for by the Public Service Commission, the tests would have shown results substantially lower. The appellee's attempt to induce this Court to believe that "something just as good" was supplied fails as utterly at variance with the facts.

Thirdly: It is argued that the maxim of "clean hands" does not apply because appellee "has not violated conscience and good faith in regard to or connected with the matter in litigation." The appellant vehemently contended in its main brief and still urges that the appellee did "violate conscience" did evidence a gross and flagrant lack of "good faith." Perhaps conclusions as to conscience and business morality are better left to this Court to determine upon the record. The appellant is willing that this should be done, positive beyond a fear that this Court will judge appellee's conduct firmly and resolutely.

These matters are more minutely discussed in appellant's brief, p. 21-36.

Fourthly: It is argued that the 22 candle-power statute is not applicable to the appellee, because the Act is entitled "An Act in relation to illuminating gas," and applies only to companies supplying "illuminating gas"; that the plaintiff since January 1, 1918, has not been supplying "illuminating gas" (Appellee's brief, p.

14). This is something entirely novel in this litigation; in fact, an entirely new thought in all the gas litigation of numerous companies in the City of New York which has been engaging both the State and Federal Courts for almost three years.

The appellee is a gas company, supplying gas which lights the homes of 40,000 consumers in the Borough of Brooklyn. Its name is the Kings County Lighting Company. Its predecessor company was the Kings County Gas and Illuminating Company (p. 103, Appellee's complaint). It contracted to furnish a fixed or "permanent *illuminating gas* of such quality" etc. The predecessor company was authorized to supply "light by gas" to the old township of New Utrecht (p. 1130) and first began to furnish light to customers on September 2, 1891 (p. 1131) and has continued through the present company to supply light to 40,000 consumers to the present day, in addition to lighting 3,500 street lamps of the City of New York "to which plaintiff furnished gas for street lighting" (appellee's brief, p. 3). And yet it is claimed this Company does not suply "illuminating gas." Judge Greenbaum continually referred to this appellee as "the illuminating company" in his opinion 110 Misc., 204, in the prior case. With a naiveté that is astounding the appellee, apparently with some degree of sincerity, urges this Court that it is not a corporation supplying "illuminating gas" within the intent of Chapter 125 of the Laws of 1906, because by its own mandate and in violation of law, it has been supplying what it chooses to call a "heat producing gas" it frees itself from the burdensome provisions of the law. This indeed is a novel, if somewhat crude, manner of construing a statute and straining language and logic beyond all semblance of recognition.

Answering Appellee's Point that the Prior Suit is not Res Adjudicata.

We respectfully refer to our main brief pages 7-13 where we believe the points raised by the appellee under this point are fully met. It is not the contention of the appellant that the prior adjudication is a bar to the instant case *if the appellee had come into court having remedied the defects which prompted the Court in the prior case to dismiss the complaint, to wit—a failure to observe the requirements of the candle-power statute and a failure to experiment with the statutory rate.* The point raised by the appellant is that with these fatal faults remaining unchanged the appellee's right to equitable relief *was res adjudicata* by the prior Court. Between these parties the Court had determined that a substantial observance of the candle-power statute and an experimentation with the rate were conditions precedent to granting equitable relief. The pleading and the testimony showed that these conditions had not been overcome. Within the ruling of this Court in

Missouri *v.* Chicago B. & Q. R. Co., 241 U. S., 533;
Southern Pacific R. Co. *v.* U. S., 168 U. S. 1, and
Washington Packet Co. *v.* Sickels, 24 How. 333;

these matters had been adjudged by a court of competent jurisdiction and, as a guarantee of the efficacy of the prior judgment, should have been held *res adjudicata*. Appellee's brief is not in point upon these matters.

Answering Appellee's Point that the Cost of Manufacturing and Distributing Gas was Established by Competent Evidence.

The appellant takes direct issue with the appellee's contentions upon this point. With the burden of proof upon the complainant to establish beyond "reasonable" and "rational," "just" or "fair" doubt the unconstitutionality of the statute (appellant's main brief pp. 13, 14, 15), that burden was *not* met by introducing into evidence the books of the appellee company; and the fact that the appellee's books were kept in accordance with a certain Uniform System of Accounts did not lend them that additional probative value which our courts have universally demanded before judicially determining that a statute is unconstitutional. Our reasons and argument upon this point are fully set forth in the brief in main pp. 68-77. As was said by the Court of Appeals of the State of New York in interpreting the scope and meaning of the law creating the Uniform System of Accounts,

> "the establishment of a system of accounts was plainly intended to make *the method* of accounting by these corporations uniform so that the accounts could be readily comprehended by those required to examine the same. * * * *It was not to regulate the management of their finances but to show what the management was*" People ex rel. N. Y. R. Co. *vs.* Public Service Commission, 223 N. Y. 373, at page 378.

The trial court in the case of Kings County Lighting Co. *v.* Newton in the state court actions reported in 110 Misc. p. 201 (New York State reports) adopted the proper rule, calling upon the complainant in that action to prove various book

items in the usual way, by the data underlying the entries in the books, by witnesses who could be produced with a personal knowledge of the matters recorded in books and by the other time honored methods of proof which our English System of jurisprudence have established.

Answering Appellee's point that the statute should be declared unconstitutional upon a showing of eighteen (18) months.

Appellee, probably realizing the necessity of the matter, attempts to extend the period in question in this case which *is* 18 *months* to three years. First by extending the period to include the date of final decree and then asking this Court to take judicial notice of the year following the final decree. The *proof* was upon the period from Jan. 1, 1919 to June 30, 1920, and this is all this Court should consider. If, however, the Court will, as appellee argues, take judicial notice of price levels in 1921, this case must be reversed. For, as we have already pointed out, the cost of manufacturing gas has been very materially and substantially decreased by the drop in gas oil prices in and about New York City from 12-3/4 cents a gallon to about 5-1/2 cents a gallon, during the latter part of 1920 and this current year. Every cent decrease in the price of gas oil means a corresponding saving of about four cents in the price of gas per thousand cubic feet. Such a reduction in the price of oil will alone account for a saving of at least 25 cents per thousand cubic feet, enough to make the statute constitutional beyond a question of doubt upon the most favorable basis that the appellee can possibly advance.

The question of the necessary period to be con-

sidered and the impotency of using a grossly abnormal period, during which prices were excessively unnatural, is discussed in our main brief pages 50-67.

We desire to correct a typographical error at page 50 of our brief. The period in the Darnell case should be six months instead of eighteen months, as therein printed.

Answering Appellee's Point That There Were No Improper Items Included in Appellee's Operating Expenses.

Coal and Oil Shortages.

The appellee does not deny that shortages claimed by the appellant existed but merely contends that the amounts were comparatively small.

Boiler Fuel Coal.

The excessive and unreasonable amount of boiler fuel used by the appellee company was based upon the testimony of the appellant's expert witnesses and admitted by the witnesses of the company. On this score, we respectfully quote from the testimony of appellee's own witness, Klumpp:

> "Q. Have you looked over the other items here—boiler fuel?
>
> "A. Yes, *boiler fuel is high compared to what I would consider good efficient operations*" (p. 353).

If the court has any doubt upon this question we respectfully refer to pages 354, 355 and 356 of the record wherein this witness Klumpp explains why he considered 18.8 pounds of boiler fuel coal excessive.

In answer to a question by counsel for appellee, witness Klumpp again said, on page 354:

> "Why if we get a good grade boiler fuel *I figure on* 12 *to* 14 *pounds of boiler fuel.*"

This was upon direct examination. Appellee's brief (p. 7) speaks of this witness as having made "an extended study of the subject," and (p. 29) "for many years engaged in supervising the operations of 30 gas plants operated in 40 cities." With the witness of appellant corroborated and entirely substantiated by appellee's own expert in this manner we feel that the deductions made in our main brief for boiler fuel (p. 81) fully justified.

Repair Expenses.

These repairs for 1919 and 1920 were unduly excessive, about 80% greater in 1919 than the average yearly repair expense for the period 1909-1919, inclusive, and for the six months of 1920 were about 150% greater than the yearly average. Appellants are justifed in asking the court to look with some degree of scrutiny upon such excessive amounts. The courts in rate cases have universally looked for some stable, average figure for operating expense items rather than accept a figure which, upon its very face, is unduly excessive, and in the light of the past experience of the company, patently exorbitant. In addition to this, the company's own President, Elsman, testified that the repairs in 1919 were extraordinary (p. 306-308).

> "A. We required in the period from October, 1918, to down until November, 1919,—we ran our Cox stoker boiler continuously. Up to that time the company was dependent entirely

upon hand fired boilers, the eight hand fired boilers, including the two tar burning boilers. Those boilers were in operation continuously from the time I went in with the company in 1917. It was not until the year of 1919 we were able to take those hand fired boilers out of operation to overhaul them and thoroughly repair them, and that we were enabled to do by the installation of our Cox boilers, when the installation of our Cox boilers was complete; and in the year of 1919, we took down and overhauled and rebricked and relined and retubed our entire installation of hand fired boilers. *All those repairs were made in the year of* 1919.

"Q. And in a word, you were enabled to do that because you had put in the new equipment and was able to put those on the idle shelf for the time?

"A. Yes.

"Q. Prior to that time you were short of boiler capacity and had to use them to intensify?

"A. Those were the only boilers we had.

"Q. And you had to use them to capacity?

"A. Yes, absolutely.

"Q. If you had had sufficient boiler capacity in 1918, probably some of those repairs would have been made in 1918, and would have been reflected in that year?

"A. Had we been able to take those boilers out of operation long enough to repair them, *they would have been repaired the previous year.*

"Q. Comment was also made referring to the other repairs about the works in 1919.

"A. 1919 or 1920?

"Q. Well, both. Is there any—

"A. Why, yes, you will find that in 1920,—*you will find a great increase in the cost of the repairs* of our water gas sets and accessories. That is due to the fact that it was necessary for us to run these machines for periods as long

as 5,000 hours before we could take them out of service; and on account of the demand for gas by the consumers, after we took those machines out of operation, instead of just finding it necessary to rechecker and rebrick them, we found many instances that we had to practically rebuild our entire machine, put in new doors where they were burned in, and hot spots in the lining, and the walls and everything had entirely gone. And instead of getting a machine back in operation in a normal period of 24 hours to three days, it has taken us as long as six weeks or two months to get a machine back in service again."

Such extraordinary repairs should be spread over a period and not confined to a single year which is chosen by the appellee, for the purpose of establishing the unconstitutionality of a legislative rate. The courts have, without exception, followed such a rule in all rate litigation.

Unaccounted for gas.

This question is fully discussed in the main brief (pp. 36-44), and needs no further comment except to reiterate that the "unaccounted for gas" of New York City companies has never gone beyond 8%. Judge Hand reduced the 7% claimed by the Consolidated Gas Company to 4.1%. The Brooklyn Union Gas Company charges its subsidiary companies located in territory similar to the territory served by the appellee, 8% for "unaccounted for." It is most unlikely and contrary to all business experience that the Brooklyn Union Gas Company would charge its subsidiaries a lesser amount than the experience of the past indicated was a fair amount. If the company were to err, in a matter of this kind, the error would lean, in

all probability, towards a slightly excessive figure, rather than one which was insufficient to meet the actual conditions; any other policy would be poor financial management.

Counsel for appellant conceded at the trial that the 8% charged by the Brooklyn Union Gas Company to its subsidiaries did "not represent any actual unaccounted for"; that is, it was conceded that the 8% was not an *actual mathematical measurement* of the unaccounted for gas. It was not conceded, however, and never was it intended to concede that the 8% was not at least a fair approximation of the gas lost. The directors of the Brooklyn Union Company, with the experience of the past to judge by, fixed this figure and it is more than likely that it represents the *maximum amount* of gas actually lost. In the trial of the Newtown case (one of the subsidiaries of the Brooklyn Union) before Special Master Graham, appointed by the Federal Court for the Southern District of New York, recently tried, the master held that the Newtown company was bound by this figure of 8% for unaccounted for, having been fixed by the Board of Directors of the parent concern. 8%, we urge, is a very liberal figure to allow for the appellee.

Auditing expense.

Appellants' reasons for asking for a disallowance of this item are given on p. 84 of the main brief appellee's brief to the contrary notwithstanding.

Street Lighting.

The appellee does not deny the loss occasioned in municipal lighting. It contends that it is "an incident of the business." Appellant again urges that the consumers should not be charged with

any such loss and also urges the point set forth in Point VIII of our main brief (pp. 67, 68) that by reason of the duplicate character of appellee's business (a) Service to private consumers, (b) Service to the municipality, there was such a non-joinder of parties as to make the determination of the confiscatory character of the statute impossible of determination. This point is not answered by appellee's brief.

Uncollectible Bills.

Appellant's main brief, (pages 86, 87 & 88) covers this topic sufficiently. The appellee seems to argue that since this amount is less than 1 cent per thousand cubic feet of gas sold, it should be ignored.

Strike—towage.

Appellant contends that such an unusual and infrequent expense should be disallowed in a rate case for the same reasons advanced under the caption "repair expense." Appellee confuses actual operating expenses and operating expenses allowed in a rate case. Unusual and extraordinary expenses are perhaps chargeable to operating expense, but in the trial of rate cases the courts are seeking to obtain the usual, ordinary, year-after-year expenses of a company in order to determine what the future experience of the company will be. Prophecy is not best predicated upon accidents of the past. Courts attempt to fix a company's future operating expense upon *the usual and normal expenses* of the past.

Water—Gas Tar, and Quantities of Gas Oil Used.

Upon these matters we respectfully refer to our main brief (pp. 88, 89 and 90.)

The appellant received a page-proof copy of part of appellee's brief on the 7th of November, and a typewritten copy of part of the brief on the 9th of November. In this brief time we have attempted to reply to the points raised by the appellee in its brief as we received it.

AS URGED IN OUR MAIN BRIEF, THE DECREE HEREIN SHOULD BE REVERSED AND THE COMPLAINT DISMISSED.

Respectfully submitted,

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